

Irwin Industries, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.
Cases 31-CA-20526, 31-CA-20774, 31-CA-20776, and 31-CA-20806

May 19, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
LIEBMAN

On September 18, 1996, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Charging Party filed exceptions and a supporting brief, answering briefs and reply briefs. The Respondent filed cross-exceptions and a supporting brief, a brief in opposition to the Charging Party's exceptions, a brief in support of the administrative law judge's decision, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.

1. The judge found, and we agree, that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging employees Kyle Evenson, Roger Womack, and Robert Youngblood from its Ultrapower job at Blue Lake, California. In adopting the judge's finding, we rely on his crediting of the Respondent's witnesses, who testified that the three employees were discharged as a result of complaints by the contractor, Ultrapower, that they had not performed a sufficient number of welds during their shift on the evening of November 2, 1993. Thus, we conclude that the Respondent has carried its burden under *Wright Line*³ of proving that it would have discharged the three employees even in the absence of their protected activity.

2. We do not agree, however, with the judge's recommendation that the Charging Party Union be re-

quired to reimburse both the Respondent and the Board for reasonable counsel fees and expenses incurred in the investigation and litigation of the charges and complaint allegations pertaining to the Respondent's discharges of the three employees. The judge recommended this extraordinary reimbursement remedy because he found (1) that the unfair labor practice charges filed by the Charging Party were "frivolous," "bogus," and "knowingly false" and (2) that the collective participation of employees Evenson, Womack, and Youngblood in endeavoring to obtain certain safety data⁴ "was contrived for the purpose of intentional delay and was not undertaken in good faith," but instead was part of the Charging Party's organizing campaign strategy. We do not agree with the judge's characterization of the Charging Party's charges, nor do we agree that the record supports the finding that the three above-named employees acted in bad faith on requesting the safety data in question.

Initially, we note that the judge's conclusion that the Respondent did not unlawfully discharge Evenson, Womack, and Youngblood was based largely on his credibility determinations regarding conflicting testimony concerning the events at issue. Specifically, the judge noted that the testimony of the Respondent's witnesses "is diametrically opposed" to the testimony of the employees, and he decided to credit "the testimony of each of the Respondent's witnesses," stating that they were "forthright." Thus, the complaint allegations regarding the discharges at the Ultrapower job essentially presented the judge with the commonplace situation in which conflicts in testimony are resolved by the crediting of certain witnesses⁵ and the discrediting of others. Moreover, even untruthful testimony, although never to be condoned, does not alone justify the kind of extreme sanction imposed by the judge.⁶

In addition, testimony by the Respondent's own witnesses undercuts any notion that the unfair labor practice charges filed by the Charging Party were

⁴Specifically, Materials Safety Data Sheets (MSDS), which contain information regarding possible hazardous materials in the work environment.

⁵Among the witnesses credited by the judge was Omar Shair-Ali, the Respondent's day superintendent. In fn. 13 of his decision, the judge expressed concern that the Charging Party may have engaged in retaliation against Shair-Ali for testifying adversely to the Charging Party in the instant case. We do not rely on the judge's statements in fn. 13 of his decision. The matter discussed in that footnote was neither alleged nor litigated during the hearing. In addition, the matter raised in fn. 13 of the judge's decision does not involve a material issue in this case. Accordingly, we deny the Charging Party's motion to reopen the record, which sought to introduce evidence concerning this matter.

⁶See *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994) (the Board is within its discretion in awarding reinstatement with backpay to discriminatee who falsely testified at administrative hearing); *Owens Illinois*, 290 NLRB 1193 (1988) (the Board reinstated discriminatee with full backpay despite five "examples of untruthfulness" in her testimony).

¹The Charging Party's motion to strike the Respondent's cross-exceptions is denied. The Respondent has a right to file cross-exceptions and a supporting brief under Sec. 102.46(e) of the Board's Rules because it is a "party who has not previously filed exceptions."

²The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

“bogus.” Neil Harris, Ultrapower’s maintenance supervisor at the Blue Lake site, testified that despite the fact that two Ultrapower control room operators kept logs of any “significant” events at the plant such as a crew not working, sabotage or slowdowns, there were no such notes in the logs for the periods of time when Evenson, Womack, and Youngblood were working. Further, the record shows that during the events in question, the crew consisting of these three employees offered to go to a different area of the plant and perform other work during a period when they could not perform their assigned work because of a “fan balancing.” Thus, the Charging Party had a reasonable basis for believing that the discharges of Evenson, Womack, and Youngblood were in retaliation for their union activity. The fact that the Charging Party did not ultimately prevail does not mean that its unfair labor practice charges were frivolous.

Further, it is undisputed that employees had a right to request Materials Safety Data Sheets (MSDS) and that the Respondent was legally obligated to supply them. It is further undisputed that a safety meeting called by Ultrapower’s plant engineer, George Nowland, not the employees’ request for the MSDS, caused some of the delay in performing the employees’ welding on the evening in question. Further, even if the employees had requested the meeting, Nowland testified that it was not unusual for workers to ask for safety meetings. At the meeting the three employees told Neil Harris that they did not believe their work area was safe. No one contradicted their claim and no one present asked to see their work area. Rather, in response to the employees’ expressed concern Harris told them to “make it safe before you work.” In sum, the record does not support the judge’s finding that the employees’ request for the MSDS information was frivolous and in bad faith. Accordingly, we find that the Charging Party’s conduct here does not demonstrate fraud and does not rise to the level of misconduct that would warrant the remedy recommended by the judge.⁷

⁷The General Counsel contends that the Charging Party has engaged in misconduct in this case which warrants referral of the matter to the Department of Justice for “possible prosecution for violation of criminal statutes protecting the Board’s processes.” Specifically, the General Counsel argues that employees Evenson, Womack, and Youngblood “literally manufactured an unfair labor practice . . . and then provided knowingly false testimony to give it support.” As discussed above, we do not agree with the judge that the unfair labor practice charges related to the discharge of these three employees were frivolous and knowingly false. Nor do we agree with the General Counsel that there is evidence of abuse of the Board’s processes with respect to these three employees’ testimony. This case does not present a situation like that presented in *Multimatic Products*, 288 NLRB 1279, 1335–1337 (1988), where credited testimony by two former employees established that a union fraudulently backdated their authorization cards in order to present a majority showing when it demanded recognition from an employer. The union in *Multimatic* thereafter lied about its conduct to Board

We also find, in agreement with the General Counsel, that the Board lacks the statutory authority to order the reimbursement remedy recommended by the judge. Section 10(c) of the Act empowers the Board to impose remedies only upon persons “named in the complaint,”⁸ i.e., a respondent. Here, of course, the Charging Party is not a respondent and has not been found to have violated the Act.⁹ See *Teamsters Local 291 (Kaiser Industries)*, 236 NLRB 1100, 1106 fn. 20 (1978).

3. The judge also found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to hire 30 job applicants who, with the Charging Party’s assistance, applied for work en masse and designated themselves as “volunteer union organizers” on their applications. We agree with this finding, but we do not rely on all of the rationale set forth by the judge on this matter. Specifically, we do not adopt the judge’s finding that the “Respondent was under no obligation to hire as employees any of the applicants who announced they were volunteer union organizers” because of the Charging Party’s alleged prior misconduct at the Ultrapower job, discussed above. The judge’s finding is contrary to established Board precedent that where an employer refuses to hire an individual or individuals who have written “volunteer union organizer” on their applications, it cannot use such designation to disqualify applicants for hire unless “any of the applicants, in fact, engaged in disqualifying misconduct.” *Brown & Root U.S.A.*, 319 NLRB 1009, 1009 (1995). Here, there is no evidence that any of the applicants engaged in any misconduct.

personnel during the investigation and litigation of the case. Under these circumstances, the Board determined that the union’s conduct warranted referral to the Department of Justice for possible criminal prosecution. In contrast, here, at the end of the extensive hearing in this case, the General Counsel delivered a closing argument asserting the veracity of his witnesses and questioning the credibility of several of the Respondent’s witnesses. There was no showing here that the Charging Party created any fraudulent evidence. Rather, as mentioned above, the judge here simply credited one party’s testimony over the other. Accordingly, in these circumstances, we decline to refer the aforementioned matter to the Department of Justice.

⁸Sec. 10(c) of the Act reads, in pertinent part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue or cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act.

⁹The judge cited *Davis Supermarkets*, 306 NLRB 426, 428 (1992); *Heck’s, Inc.*, 215 NLRB 765 (1974); and *Tidee Products*, 196 NLRB 158 (1972), as authority for imposition of an affirmative remedy against the Charging Party in this case. None of those cases, however, stands for the proposition that the Board has the authority to impose remedies against persons other than those named as respondents in the complaint.

Accordingly, in agreeing with the judge's dismissal of the complaint allegations regarding the Respondent's failure to hire any of the aforementioned 30 applicants, we rely on the judge's finding that at the time of the mass application, the Respondent "was not in a hiring mode," "there was no work immediately available for [the applicants]," and the Respondent's established practice was not to hire employees simply on the basis of the submission of applications with no followup contacts with the Respondent. The record supports the judge's finding that historically, employees of the Respondent were hired on the basis of referrals, prior work experience with the Respondent, or continued and persistent efforts to obtain work after the submission of an application. Here, the evidence shows that none of the 30 applicants who applied on February 3, 1994, actively sought employment with the Respondent after submitting their initial applications. Thus, we agree with the judge that the record fails to establish that the Respondent refused to hire any of the 30 applicants because of their union affiliation or activity.

ORDER

The complaint is dismissed in its entirety.

Ann Cronin-Oizumi, Esq., for the General Counsel.

James T. Winkler, Esq., and *Steven D. Atkinson, Esq.* (*Atkinson, Andelson, Loya, Ruud & Romo*), of Cerritos, California, for the Respondent.

Michael J. Stapp, Esq. (*Blake & Uhlig, P.A.*), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Los Angeles, California, on July 17, 18, 19, 20, and November 6, 7, 8 and 9, 1995, and on January 23, 24, 25, 26, and April 15 and 16, 1996. The charges in the captioned cases were filed between the dates of April 19 and September 14, 1994, by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Boilermakers or the Union). On February 16, 1995, following the issuance of an initial complaint and a subsequent consolidated complaint, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a second consolidated complaint and notice of hearing alleging violations by Irwin Industries, Inc. (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). The Respondent's answer to the second consolidated complaint, duly filed, denies that it has engaged in the unfair labor practices as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. In addition to the presentation of oral final argument at the conclusion of the hearing by counsel for the General Counsel and counsel for the Respondent,

briefs have been received from counsel for the Respondent and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Long Beach, California, and with jobsites located in California, Arizona, and elsewhere, and is engaged in the business of performing maintenance, repair, and construction work for oil refineries and utility companies. In the course and conduct of its business operations the Respondent annually sells and ships from its California locations goods or services valued in excess of \$50,000 directly to points located outside the State of California, and annually derives gross revenues in excess of \$500,000. It is admitted, and I find that at all times material herein the Employer has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is, and at all times material, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues in this proceeding are whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging certain employees at two separate jobsites, by refusing to hire or reinstate employees at two other jobsites, and by refusing to hire some 30 job applicants because of their union membership and/or union organizing activities on behalf of the Union.

B. The Facts

1. Background

The Respondent is engaged in the business of performing maintenance, repair, and construction work for oil refineries and utility companies. Its employees are represented by a labor organization, the International Union of Petroleum and Industrial Workers, SIUNA, AFL-CIO (the Petroleum Workers), in a single over-all unit. At all times material herein, the Respondent has had a collective-bargaining agreement with the Petroleum Workers effective from June 1, 1993, through May 31, 1996.

The Boilermakers Union does not regard the Petroleum Workers as a legitimate labor organization, and considers the Respondent to be a nonunion employer. Since about November 2, 1993, it has targeted the Respondent for inclusion in its organizing program, named "Fight Back," as a nonunion employer, and has commenced certain covert and overt activities in this regard, as described below. The allegations of the consolidated complaint herein involve the alleged discriminatory discharge of certain employees and the discriminatory failure or refusal to hire other employees at certain

specified jobsites because of the Respondents' desire to thwart the Union's organizing attempts.

2. The Ultrapower Job (Blue Lake, CA)

Prior to November 1993, the Respondent was engaged by a utility company, Ultrapower, which operates a powerplant for the production of electricity, to perform routine repair and maintenance work during a scheduled semiannual shutdown of the facility which is located at Blue Lake, California, about 60 miles from the Oregon border. This job (the Blue Lake or Ultrapower job). At that point in time the Respondent, which maintains its headquarters and main offices in Long Beach, California, had a divisional office in Vancouver, Washington, and its divisional manager, Vic Allinger, staffed the Ultrapower job.

The Respondent customarily hires individuals, including superintendents, foremen and crews for such work on an as needed, job-by-job basis, and attempts to employ individuals who have developed a favorable past employment history with it. Thus, a week or two prior to November 1, 1993, Vic Allinger, the Vancouver, Washington divisional manager of the Respondent, contacted Gary Evenson who had performed work for the Respondent on some 12 past occasions, and asked Evenson if he would act as night superintendent on the Blue Lake job. He also asked Evenson to bring his welding crew with him, which consisted of his brother, Kyle Evenson, Robert Youngblood, and Youngblood's brother-in-law, Roger Womack. Each of these individuals, who lived in or around Tucson, Arizona, had worked on at least several projects for the Respondent in the past, and were apparently known to Allinger to be good workers. Allinger gave Gary Evenson the option of flying to the jobsite or of renting a van and driving with his crew to the site, and agreed that the Respondent would pay the transportation costs. Gary Evenson elected to rent a van and drive to the site, a distance of over a thousand miles, and arrived with his crew at the Blue Lake facility on the evening of November 1, 1993.

The Respondent's total crew at the Blue Lake site consisted of some 20 individuals, all apparently hired directly or indirectly by Allinger. The crew included a day superintendent, Omar Shair-Ali, who, because of his designation as day superintendent, was considered to be the lead superintendent over Night Superintendent Gary Evenson and therefore was the highest ranking representative of the Respondent on the job. In addition to the aforementioned superintendents, the crew consisted of a day foreman, a night foreman, and approximately 16 employees, most of whom, apparently, were welders. The record shows that the employment of Shair-Ali for this job was also initiated by a phone call from Allinger and, similarly, Shair-Ali was asked to bring a welding crew with him. Further, the record shows that the designated foremen were similarly hired by Allinger, and were also asked to bring additional crew members with them. It is clear that the superintendents and foremen who bring crews with them are, in effect, vouching for the competence of the men they select.

The repair work "cost and materials" contract between Ultrapower and the Respondent was scheduled to be performed on a round-the-clock basis in some 5 or 6 days, and sooner if possible, as in shutdown situations the powerplant is off-line and time is of the essence. The day shift was scheduled to commence work at 7 a.m. and work until 7 p.m.

each day, at which time the night shift would continue where the day shift had left off and would work from 7 p.m. until 7 a.m. the following morning. Each superintendent had one foreman and about eight other workers on the shift. Thus, each was not only responsible for the work of the men he personally brought to the site, but was also responsible for the work of the entire shift.

Ultrapower personnel were also present during the shutdown and, in addition to other work which they performed, they had the responsibility of overseeing the work of the Respondent's crew in order to insure that the maintenance/repair work was proceeding according to schedule.

Gary Evenson and his brother, Kyle Evenson, in addition to belonging to a local of the Union herein and working as welders, have been employed by the Union for several years prior to the incidents involved herein as paid international representatives with the title of "Fight Back" organizers; they earn substantial annual salaries for such efforts, in addition to the wages they receive from performing welding and related work. According to the testimony of Gary Evenson, the Fight Back campaign was initiated because of the erosion of union membership, wages, benefits, and jobs, due to the proliferation of nonunion employers; the purpose of the campaign is to bring in more union members and obtain more work for union members, and to organize employers with the expectation that they will become signatory to union contracts. In furtherance of these ends, the Fight Back campaign strategy involves the process of obtaining employment with nonunion contractors for the express purpose of organizing their employees from the inside, as other methods of organizing had not proven to be successful. As Gary Evenson testified:

Our fight back program gives us a chance to showcase the skill and training that our members receive . . . We get a chance to go out and showcase these skills to some of the non-union contractors and show them that we're the best, the most cost productive labor work force available.

Gary Evenson testified that although he and other Boilermaker union members have been employed on a great number of the Respondent's jobs in the past, the Union had not yet commenced to apply its Fight Back tactics to the Respondent as the jobs were for short durations and/or there were not a sufficient number of employees on the jobs to warrant the initiation of an overt organizing campaign. The Blue Lake job fell into this category, and initially there was no intention to engage in organizing activities at the Blue Lake job.

However, when Gary Evenson and his crew arrived at the Blue Lake site on November 1, 1993, for the start of the evening shift, lead superintendent Shair-Ali, in addition to outlining the work that Gary Evenson and the entire night crew would be performing, presented Gary Evenson with the following document, dated November 1, 1993, and asked him to sign it:

I, Gary Evenson, hereby sign that I'm here for the best interest of IRWIN INDUSTRIES INC. AND NOT for the benefit of the International Brotherhood of Boilermakers as a "Union Organizer."

Evenson signed the document.

Shair-Ali testified that, as a precautionary measure, it was his idea to have Gary Evenson sign the document as he was well aware of Evenson's activities as a union organizer. Thus, Shair-Ali was also a member of a different local of the Union and was familiar with Evenson's organizing activities, including Evenson's conducting of Fight Back seminars before various groups of union members. Shair-Ali testified that he had previously spoken to Allinger about the matter, and Allinger agreed that Evenson's signature on the foregoing document would be appropriate under the circumstances, as Evenson was hired in a supervisory position and the Respondent had a right to the allegiance of its supervisors. Moreover, according to Shair-Ali, Allinger too was well aware of Evenson's activities as an organizer, as this was rather common knowledge in the industry; however although Evenson had worked for the Respondent many times in the past, and had done an excellent job, the Union had not overtly targeted the Respondent as an object of its organizing activities.

The following morning at the end of the night shift, Gary Evenson phoned the Union's director of organizing in Kansas City and explained that when he and his crew had arrived at work he had been asked to sign and did sign the aforementioned letter. He explained to the director of organizing that he, and by association, his crew, were no longer "under cover" and had obviously been found out by the Respondent and told him that, "Personally, I think it's about time to kick the campaign off now, because they found out about us I thought it was time to go public with our campaign." The director of organizing granted this request.

Back at the motel where Gary Evenson and his crew were staying, he explained the situation to his brother, Kyle Evenson, who wrote out the following document addressed to the Vancouver, Washington offices of the Respondent:

To all officers, supervisors, and/or agents of Irwin Industries, Inc. Be advised.

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers and your Construction, Maintenance, and Repair employees, employed at the Ultra power facility in Blue Lake, Ca. are currently engaged in organizing activities that are protected under section 7 of the National Labor Relations Act.

The below listed employees wish to be identified as the organizing committee.

The document is signed by employees Kyle Evenson, Willard Youngblood, and Roger Womak, and is again executed by Kyle Evenson as "International Representative Organizer, International Brotherhood of Boilermakers."

At the beginning of the night shift on November 2, 1993, Kyle Evenson, accompanied by Youngblood, Womak, and a local union representative, handed the document to Superintendent Shair-Ali. While Shair-Ali was reading it the three employees conspicuously "badged up" by placing various union buttons and stickers on their hardhats and clothing. Also, at some point that evening, Gary Evenson placed a union sticker on his hardhat.

Kyle Evenson, Youngblood, and Womak were then told to go to work by the night-shift foreman, Rocky Waltman, and

were assigned by Waltman to start welding on tubes in a section of the powerplant boiler called an economizer (sometimes also referred to in the transcript as the boiler). It is located about seven stories up from ground level and is accessible by stairs and catwalks. The economizer is a large, steel-walled, insulated box-type room, several stories high, that contains a series of tubes in which water is preheated prior to entering the boiler; beneath the lower section of tubes in the economizer is a hopper about 6 feet deep, in which residue from the boiler is collected. Immediately above the hopper are 12 platens (also called tube bundles or tube assemblies) each consisting of nine long lengths of two-inch pipe connected by "U" tubes in a serpentine configuration, which are welded to tube ends (headers and risers) protruding from the sides of the economizer.

On the first night shift Kyle Evenson, Youngblood, and Womack were assigned to perform certain welding work on new replacement platens in the fabrication shop on the ground floor of the facility; these new platens were to be installed in the economizer. On the second night, these men were assigned to install these new platens in the economizer. Once the platens were brought up to the economizer from the ground floor and set in place prior to welding,¹ the welding work essentially consists of making a total of 24 welds, one lower weld and one upper weld for each platen.

It is admitted that the three employees only performed three welds during the course of the entire 12-hour night shift, and that they were capable of performing from 6 to approximately 10 or 12 welds under proper conditions.

The General Counsel and the Union attempt to justify this apparent deficient productivity by contending that several factors hampered the productivity of the crew: namely, that the crew had to spend some 3 or more hours making the area safe to work in; and that there was considerable "down time" during the shift due to an intervening safety meeting which consumed about an hour of worktime and, further, due to a 3-hour delay during which the welding crew was instructed to come down from the economizer and wait until other work (the balancing of a large fan) had been completed.

The Respondent, on the other hand, maintains that the work area was in a clean and safe condition at the very start of the shift and that no clean up time was necessary prior to the commencement of welding, and, moreover, that the down time was minimal. It is the Respondent's further contention that the evidence overwhelmingly shows that the four individuals, namely, the three employees and Superintendent Gary Evenson, were engaged in an intentional slowdown in order to attempt to "manufacture" a bogus unfair labor practice scenario and/or to cause the Respondent to lose a customer, Ultrapower, due to insufficient production.

It appears unnecessary to recount the specific testimony of each of the four individuals regarding the condition of the economizer work area at the start of the work shift on the second night of work. Generally, each of them testified that the work area was a hazard and a mess;² there was insuffi-

¹ Apparently other members of the crew bring the platens to the economizer and set them on the catwalk so that they are available for the welding crew to bring them into the economizer and set them in place prior to welding.

² This is not to say that their testimony was entirely consistent; it was not.

cient lighting; the day shift had left welding hoses strewn about rather than coiling them up; there was no proper scaffolding to provide a floor or platform above the hopper upon which to work; the few planks set across some of the cross members and used as scaffolding were not wired down and there was an open drop of some 6 or 8 feet into the hopper beneath the scant and insufficient scaffolding that was there; the wool insulation batting removed from the steel skin or wall of the economizer was strewn about and was not bagged; and the steel skin of the economizer wall which had been removed by the day shift was awkwardly hanging there in a manner that hindered the work and was not properly placed out of the way. All of these things, according to the four individuals, impacted their safety and had to be rectified prior to the commencement of welding and it took the crew some 3 to 4 hours to accomplish this cleanup and preparatory work before welding could begin.

The testimony of the Respondent's witnesses is diametrically opposed to the foregoing assertions of Gary Evenson and his crew. Thus, each of the Respondent's witnesses, *infra*, testified that they observed the economizer area prior to the arrival of the night shift, and that it was safe and in excellent condition: there was sufficient lighting, the necessary welding hoses were in place for the night-shift crew, the insulation had been bagged up and was not in the way, the steel skin of the economizer was set aside out of the way, and a solid plywood scaffolding had been constructed so that there was no danger of the men accidentally falling into the hopper below the scaffolding.

In addition, the Respondent's day superintendent, Omar Shair-Ali, was responsible for the progress of the work, and took photographs of the economizer area prior to the arrival of the night crew on the night in question in order to document the condition of the economizer at that point in time. Each of the Respondent's witnesses, upon looking at the photographs, unequivocally confirmed that the photographs were of the economizer in question and that they depicted the condition of the economizer just prior to the arrival of the night shift. Further, it is admitted by Kyle Evenson that the photographs in question portray a work area that is safe and hazard free and ready for the performance of welding work. Thus, on rebuttal, upon looking at one of the photographs of the economizer area, Kyle Evenson testified that he and the crew "would not have had to do a darn thing if it had looked like that . . . I mean, that's pretty nice. That's beautiful there. That's nice scaffolding there."

Given the state of the record as set forth above, there seems to be no "middle ground" or basis for honest disagreement as to the condition of the economizer at the beginning of the night shift on the evening of November 2, 1993. Thus, if the photographs depict what Respondent's witnesses say they depict, then the testimony of the Evenson brothers, and Youngblood and Womack is a total fabrication. Conversely, if the photographs are of some different economizer at some different powerplant, or were perhaps taken at a different time, as contended by the Union, then the testimony of the Respondent's witnesses is intentionally false.

Kyle Evenson's prior jobs with the Respondent were obtained through Bub Williamson, a project superintendent for the Respondent. Kyle Evenson testified that his brother Gary hired him to work on the Blue Lake job as a welder. He worked with a partner, Youngblood, and a mechanic or help-

er, Womack. A mechanic, according to Kyle Evenson, is someone who preps the tubes, cleans them and does the layout work on them "he might help you build a scaffold or string leads, welding leads, hoses and stuff like that you need."

Kyle Evenson testified that when the November 1, 1993 shift ended at 7 a.m., after discussing the matter with Gary Evenson, he spoke to Youngblood and Womack "about starting to attempt to organize the company because I was afraid there was some people out on the job that recognized who I was and we wanted to protect ourselves so we wouldn't . . . be laid off early or something like that without having a chance to attempt to organize it."

According to Kyle Evenson, when the crew arrived at the economizer on the evening of November 2, 1993, shortly after 7 p.m., "it was pretty much of a mess up there," and Evenson proceeded to describe the condition of the economizer as set forth summarily above. Evenson then testified that he and his crew started straightening things up a little bit, and observed that on the inside of the economizer "there was a bunch of ash in there and dust and stuff." This observation caused them concern over the possibility of unknown health hazards, and they decided that they should inquire about the safety of the interior of the economizer.

Accordingly, at about 7:30 p.m., the three of them went down to the ground floor to look for Superintendent Shair-Ali. They handed him a written paper, signed by each of them, asking for implementation of the hazardous communications program, and requested the Materials Safety Data Sheets (MSDS) which contain information regarding possible hazardous materials in the work environment. According to Evenson, they sought to obtain this information prior to the time they commenced to clean up the area, as the MSDS reports would contain a written list of hazards to which the men could possibly be exposed. The paper, according to Evenson, said something to the effect that "the below-listed employees request to see the written hazardous communications program." Seeking out Shair-Ali consumed, according to Evenson, approximately a half-hour, as the crew had to walk some seven stories down to the first floor to find Shair-Ali, and then return to the economizer. Shair-Ali told them that he would look into their request, and they then went back to the economizer and began cleaning up the work area "a little bit more."³ At about 8 p.m., Superintendent Gary Evensen came up and instructed them to attend a safety meeting for the entire crew that was being held as a result of their safety related request. George Nowland, the plant safety man for Ultrapower, conducted the meeting and answered all their safety questions to their satisfaction. In addition, the Material Data Safety Sheets were made available to them, and they were assured that there were no hazardous wastes in the economizer as the boiler in that plant burned only wood chips. This meeting lasted about 45 minutes or

³The testimony of Kyle Evenson differs from the testimony of Youngblood. Youngblood testified that he and Womack did not accompany Kyle Evenson to the first floor to seek MSDS information; rather, Youngblood testified that he and Womack remained in the economizer area "and kept removing debris from around the area and getting boards together." However, the record evidence is clear that, in fact, the three of them went to the first floor together, and that Youngblood and Womack did not remain in their assigned work area and did not continue working during this time period.

so. Then, according to Kyle Evenson, at about 9 p.m. everyone went back to work.

Kyle Evenson testified that he and his crew continued cleaning up the economizer area and bringing in scaffolding for about 3 hours, and then began welding tubes for a short time⁴ when, at about 12:30 a.m., a half hour before the customary lunchtime, Gary Evenson came back up to the economizer and told them to stop work and go to lunch a little early because a large fan was about to be "balanced." Balancing the fan, an operation performed by a different contractor, involved starting the fan and testing its performance with specialized sensing equipment; because of this, the work in the economizer had to be halted as the breeze from the fan could effect the welding process. Thus, according to Kyle Evenson, the crew left the economizer around 12 midnight or so, had lunch, and then sat in their van which was parked about 20 feet from the tool room where the rest of the night crew had congregated. It took 3 to 4 hours to balance the fan, during which time the entire night shift remained idle. Kyle Evenson testified that Gary Evenson directed Kyle and his crew to go back to work just before clean up time, which was about 20 minutes to 7 a.m.

During the entire shift Kyle Evenson and his crew completed only three welds: Evenson welded one tube by himself and he and Youngblood welded two tubes as partners (apparently Womack assisted them); they actually spent only about 2 or 3 hours performing welding work during the 12-hour shift, as the safety meeting, the cleaning up of the economizer and erecting of scaffolding, lunch, and the shut down time for the fan balancing consumed the remaining nine or so hours.

The next evening when they arrived at work they went into the tool room to sign in and Kyle Evenson heard Vic Allinger, who had traveled to the jobsite from Vancouver, Washington, ask Gary Evenson to step outside the van. Allinger said that the Ultrapower people had complained that production was really down the night before and that they wanted the whole night shift fired. Then Gary Evenson told the entire night shift that they had been laid off, and they were all given layoff slips either by Allinger or by Shair-Ali.

The next day, November 4, 1994, Kyle Evenson, Youngblood, and Womack established a picket line at the site. They carried picket signs for 2 days with the following legend: Irwin Industries, Inc., Unfair Labor Practices, International Brotherhood of Boilermakers, AFL-CIO-CFL. Gary Evenson did not participate in the picketing. Then they were told that the day shift had worked all through the night of November 3, 1994, and all through the next day, and had completed the job at about 4 p.m. on November 4, 1994. At this point the picketing was discontinued, and Gary Evenson and his crew left the area.

Kyle Evenson described his work as an organizer: He was to hire in with nonunion contractors and attempt to organize them because it's easier to organize from the inside; and he was to solicit authorization cards from the workers, solicit union membership, and seek an election.

Neil Harris is the maintenance supervisor for Ultrapower. Harris testified that he contacted the Respondent to perform some of the maintenance during the semiannual scheduled

maintenance shutdown of the plant. During the shutdown the maintenance work was ongoing around the clock, and Harris was on the 7 a.m. to 7 p.m. shift; his counterpart, George Nowland, was the nighttime supervisor from 7 p.m. until 7 a.m. The purpose for this 24-hour schedule was to finish the job in the least amount of time so the plant could be placed back online as soon as possible, as downtime, when electricity was not being sold to the consumer, was nonproductive and therefore deprived the company of revenue.

Harris testified that on November 2, 1993, the afternoon of the second day of the shutdown, he made his usual rounds to make safety checks and to insure that the maintenance work was progressing. At about 4 p.m. that afternoon he went up to the economizer and observed that the day shift had removed the economizer skin and had bagged up the wool insulation that had been inside the wall and had placed it in plastic bags that Harris had furnished the day shift for this purpose. At the most, according to Harris, there may have been a few isolated fragments of insulation on the floor, as it falls apart pretty easily. He also observed that a hole had been cut in the skin of the boiler for the purpose of permitting the welders to have access to a particular weld on one of the platens that was positioned against the side wall of the boiler.

Harris testified that the following morning, when he returned to the plant, he received a report from the night supervisor, Nowland, who advised him that the night shift economizer crew wasn't getting any work done, that there was very little production, and that they had only performed three welds all night. Nowland expressed his concern with this lack of production and the fact that the maintenance work was falling behind schedule. He reported to Harris that it seemed that the Respondent's night welding superintendent and his "buddies" seemed to be slowing things down, but that the remainder of night crew seemed to be trying to get the job done. At that point Harris and Nowland spoke with Respondent's day shift superintendent, Omar Shair-Ali, about the matter, and asked him what was going on. Shair-Ali said that there was "some union thing going on," but he did not elaborate. Harris told him that he and Nowland were very dissatisfied with the amount of production done on the night shift by the Respondent's employees.

Shortly thereafter, Harris phoned Respondent's manager, Vic Allinger, at the Respondent's Vancouver, Washington office. He told Allinger the following:

I told him that the night crew wasn't getting anything done. The supervisor and some of his buddies seemed to be slowing things down. I told him there were portions of the night crew that wanted to work but it didn't seem like they were able to and there was just no production that night or very little production. I told him I don't care what you do, come down here and make sure . . . that this job finishes on schedule.

As a result, Allinger came to the jobsite that afternoon.

Upon the completion of the job, Harris demanded that the Respondent adjust the billing as a result of the unproductive night shift. The billing invoice specifically states that the billing amount was being decreased to reflect the unproductive night shift and, in addition, the fact that the day shift

⁴ However, Youngblood testified that they "probably never started welding until the second half of the shift at some point."

had been given premium pay for the overtime needed to complete the work.

On November 4, 1993, the Ultrapower plant manager sent a letter to Allinger at the Respondent's Vancouver, Washington office setting forth Ultrapower's dissatisfaction with the work performed by the night-shift crew, which caused the boiler repairs to fall behind schedule. The letter goes on to state that the number of welds in the economizer during a 12-hour shift were unacceptable, and continues as follows:

I felt that this night crew did not work in a professional and timely manner and was not up to your usual standards.

Please be advised that this non-professional work performance will not be tolerated on the UP-3 plant site. I appreciated your quick action in taking care of this condition to ensure that the work was performed as per contracted.

Day Superintendent Omar Shair-Ali testified that he has been a member of several locals of the Union herein for approximately 11 years. He had initially met Gary Evenson on a project in Arizona, where Shair-Ali was in charge of documentation of the progress of the work, and, in this regard, took photos and made weld maps to indicate the identity of welders who made individual welds. He had also worked with Gary Evenson in Pocatello, Idaho. Shair-Ali had obtained all of his jobs with the Respondent, including the Blue Lake job, through Vic Allinger. He brought one employee with him to the Blue Lake job, and testified that he has worked at the Blue Lake site on a number of occasions, maybe six times, for other employers, performing similar maintenance work on this very economizer; however, this was the only time that all of the platens in the economizer had been removed at one time. Apparently unbeknownst to the General Counsel's witnesses, Shair-Ali took photographs of the progress of the Blue Lake job for inclusion in his report to the Respondent's management documenting the progress of the job. While not required to take photographs, he testified that he has a practice of doing this on all the jobs on which he is the lead superintendent.

Shair-Ali testified that he took photos of the economizer at the end of the day shift on November 2, 1994, the second day of work, prior to the start of the night shift. This series of photographs was introduced into evidence herein and Shair-Ali explained that they show that the day crew had removed all the old assemblies or platens, and had placed 2 of the 12 new assemblies in the economizer, the far left assembly and the far right assembly. The photos also show a hole cut in the wall of the economizer in order to gain access to the back side of the far right assembly for welding purposes.⁵ This had all been done during the day shift on November 2, 1994, by about 3 p.m. The photos also depict that the inside of the economizer had been cleaned up so that the welding work could be commenced immediately by the night shift: the insulation from the walls had been placed in plastic bags, and plywood scaffolding had been laid over the steel beams in the economizer in order to make a solid floor to

support the day shift workers during the removal of the old platens and the installation of the new platens. As noted above, two new platens had been set in place preparatory to being welded, but had not yet been welded to the headers (on the bottom) and the risers (on the opposite end at the top).

Shair-Ali testified that at the beginning of the night shift on November 2, 1994, the night-shift welding crew, apparently accompanied by a business agent from a nearby Boilermakers local, began placing organizing stickers and buttons on their hat and clothing and announced to Shair-Ali that they were organizing the job. He told them that that was fine. Shair-Ali asked Gary Evenson what was going on, and Gary Evenson said that he had nothing to do with the organizing and that Shair-Ali would have to talk to Kyle Evenson about it. Shair-Ali walked over to Kyle Evenson and told him that whatever happened, he wanted it to be a "peaceful takeover."⁶ After going to their assigned work area in the economizer, Kyle Evenson and his crew came back and handed Shair-Ali a written request to see the Material Data Safety Sheets for the job.⁷ Thereupon, Shair-Ali sent them back to work and went to see Ultrapower Maintenance Supervisor Harris and told him that the night shift wanted to see the MSDSs. As a result, Harris called a safety meeting of the entire night shift. Shair-Ali did not attend the meeting.

Shair-Ali was not immediately able to contact Allinger, but did contact him later that night. He explained that Kyle Evenson, Womack, and Youngblood had handed him the organizing letter and said they were going to organize the job. Allinger said that he would come to the jobsite to see what was going on.

On the next morning when Shair-Ali arrived at work Harris approached him and reported to him that he was very concerned about the lack of productivity by the night shift, and that the welding crew seemed to be delaying the job. Apparently, Allinger was already en route to the jobsite. Allinger arrived later that day and said that he would have a talk with the night shift when they came in that evening. Shair-Ali testified that Allinger told him that he had to get rid of the entire night shift, not just the organizers, in order to protect the Respondent from an unfair labor practice lawsuit.

Shair-Ali testified that in his opinion the crew had probably delayed the job by not performing enough welds, but he did not specifically tell Allinger this as he knew that Allinger had already been advised of this by Harris. At the time of the hearing herein, Shair-Ali was not employed by

⁵ Kyle Evenson and Youngblood testified that the welds they did make that night were particularly difficult and time consuming, in part, because they had to cut a hole in the wall of the economizer in order to make a particular weld.

⁶ Shair-Ali was unfamiliar with what was happening and feared that the Union was attempting to take over the job by demanding that all the nonunion employees would have to leave, in effect creating a "hostile takeover" situation.

⁷ Shair-Ali testified that on a former job he showed Gary Evenson his union card and told him that he was a member of the Boilermakers. On another job, about a month and a half prior to the Blue Lake job, he and Evenson got fairly well acquainted, and Evenson told him that his job with the Union was to infiltrate companies and organize them, and that one tactic, according to Evenson, was to request the MSDSs and cause some delay, as the employer has an obligation to furnish such documents and employees have a right to take as long as necessary to read and comprehend the safety material.

the Respondent. His last job with the Respondent had been in June 1994.

George Nowland is the plant engineer at the Ultrapower plant. He worked the night shift during the shutdown, and had the responsibility of overseeing the work of outside crews, "with a critical eye to check up on contractors that are doing any type of work." Nowland testified that he was not entirely satisfied with Gary Evenson and his crew on their first night of work, as they had recently arrived at the site after driving a long distance, and were taking turns sleeping in the van during the time they were supposed to be working. Nowland testified that even on the first night they could have gotten more work done than they did, and that their progress was "painstakingly slow."

At the beginning of the night shift on the second night of work Nowland went up to the economizer to do his inspection and did not see anything there that would require 3 hours of preparation or cleanup time. Nowland testified that the scaffolding had been constructed; insulation had been bagged and stuffed into large plastic trash bags; the air hoses and argon hoses were on the floor, but it was customary and appropriate for the first shift crew to leave them, as the night-shift welders needed the same equipment to continue the work; there was sufficient lighting in the economizer; and there was nothing in or around the economizer that should have delayed the commencement of welding. Rather, welding work should have commenced immediately as there were two assemblies set in place but not yet welded by the day crew, as depicted in one of the photos, one assembly on one wall of the economizer and one on the opposite wall; further, a third assembly was setting just outside the economizer and had not been brought in yet because the day crew did not want it to be in the way.

Nowland testified that at the beginning of their second night of work, at the safety meeting, he believed that the questions asked by the welding crew about the safety of the work in the economizer were rather time consuming and unnecessarily prolonged the meeting; and further, that experienced journeymen boilermakers should have been able to readily discern that the plant was a wood burning powerplant and was as nonhazardous as a powerplant could possibly be as exhibited by the acres of wood chips piled many feet high out in the yard.

Nowland testified that Ultrapower is obligated by law to answer all the safety questions of all employees on the job-site, and to satisfy their inquiries regarding the work environment. He also testified that at the safety meeting when Kyle Evenson and his crew said that they did not believe their work area was safe, Harris told them to make it safe. Usually, according to Nowland, safety questions, if any, come up on the first shift that the men work after they arrive at the jobsite, as they want to know everything on the site that is hazardous in the event they will be assigned work in those areas.

Nowland testified that on the second night the balancing of the fan took about 1 hour and 35 minutes, as confirmed by the control room operator's log,⁸ and that after the fan

balancing had been completed Nowland walked to the tool trailer where most of the night crew had congregated during the down time. Gary Evenson and his crew, however, were not with the group in the trailer; rather, they were in the van parked about 20 feet from the tool trailer. Nowland told both the men in the tool trailer and Gary Evenson's crew in the van that the fan balancing had been completed and that they should get back to work. Foreman Rocky Waltman and the people in the tool room immediately went back to work but, according to Nowland, the people in the van either remained in the van or moved around and went to the bathroom, and did not return to the economizer for probably an hour or more beyond the time they had been told to return to work. During this period Nowland told them a second time that the balancing was done and requested that they should get back to work. He asked Rocky Waltman, the night-shift foreman, what was going on with the Evenson crew and, according to Nowland, Waltman replied that he didn't have any control over the people in the van and that Gary Evenson was not permitting him to do his job as foreman and get the people back to work. Then, according to Nowland, he spoke to the people in the van a third time and told them to return to work, and this time they complied.

Nowland testified that at the end of the shift, he told Harris that "we had a real problem on the night shift." Only three welds had been performed in the economizer, and at that rate the work would not be completed on time. He told Harris that something need to be done about this, as it appeared that the crew was trying to slow things down, and "we need to get rid of these guys or whatever we need to do to make sure that we get the job done." He further told Harris that the rest of the night-shift crew was staying busy, but these "guys with the buttons on" are not. Then Nowland and Harris reported the matter to Shair-Ali, and told him that the crew had hardly gotten anything done in the economizer and they were very concerned that the job would not be completed on time. Nowland testified that he specifically told Shair-Ali that it was Kyle Evenson, Youngblood, and Womack who were not performing, and that Gary Evenson was part of the group and was also hindering the job by not letting the foreman, Rocky Waltman, push his crew.

Nowland testified that there was no reason for Gary Evenson to tell his crew to take lunch early that day at 12:30 a.m. instead of the usual 1 a.m., as he had earlier told Gary Evenson that they were going to try to balance the fan at lunchtime but that the individuals who were to do this work had not arrived and so the balancing might not be able to be started until later.

Rocky Waltman was hired by Allinger as night-shift foreman for the Blue Lake job. He had worked at the Ultrapower site on many occasions before that. His job was to line out the work for the night crew. Superintendent Gary Evenson was his boss. Waltman testified that at the beginning of the night shift on the second night the economizer welding crew should have started welding after 30-minutes preparation time as there was no clean up work to do: The insulation was in bags, there was one welding lead inside the economizer and one air hose that the welders would be using; the two pieces of skin on the economizer, made of carbon steel plate, were set to one side; perhaps another light bulb was needed; the floor or scaffolding had been set in place and was constructed of plywood laid on top of planks; two panels

⁸Regarding the time involved in balancing the fan, the control room operator's log, a record kept in the normal course of Ultrapower's business, shows that the fan was balanced from 2:20 a.m. until 3:58 a.m., a period of 1 hour and 38 minutes.

or assemblies had been placed in the economizer by the day shift for the night shift to weld; and there was a hole cut in the skin of the economizer by the day crew to make it easier for the night crew to weld one of the panels that had been set in place. Waltman testified that only three welds were done that night, and that it should have taken the crew only about an hour and a half to make these three welds.

Regarding the safety meeting, Waltman testified that it is a legal obligation to have a safety meeting upon request. However, Kyle Evenson did not specifically ask for a safety meeting; rather, he requested the MSDSs on the boiler. Waltman told him that it was only a chip burning boiler, and there were no toxic materials that that could affect anybody. According to Waltman, the boiler (including the economizer) was "one of the cleanest boilers you could ever work in."

During the fan balancing, according to Waltman, Gary Evenson and his crew remained in their van while the remainder of the crew congregated in the tool trailer nearby. Upon completion of the balancing, Nowland told them all to go back to work. Waltman testified that he told everyone to go back to work, including the crew in the van, but Kyle Evenson only looked at him. Nowland then asked Waltman when the men were going to get out of the van and go back to work, and Waltman testified as follows:

The superintendent [Gary Evenson] was sitting in the truck with them and he had explained to me that those were his hands, I didn't have no control of it, that they knew we was going back to work when we walked out of the trailer. And Nowland said he would take care of it.

According to Waltman, the crew should have installed at least six panels during that shift, which would have required a total of 12 welds. Instead, they only did three welds. During the shift he did ask Gary Evenson why it was taking so long for the men to install the platens, and Gary Evenson replied that they would "get it, that's two of the best welders around."

The next day Waltman and the entire night crew got laid off. Allinger told him that he was laid off because of the lack of production on the night shift, and explained that the Ultrapower people had told him that only some of the night shift crew were nonproductive and these few were trying to drag the job out and it was hurting him on the deadline of the job. Waltman, and apparently the other members of the night-shift crew, had been previously hired by the Respondent for other jobs, so they lost very little, if any, employment.

Waltman's last job for Irwin was in June 1994. He has been a member of the Petroleum Worker's Union since 1990.

Roosevelt Fontenot was the Respondent's day shift foreman on the Blue Lake job. He had worked at the Ultrapower site on other outages. Fontenot testified that his crew on the first shift erected the scaffolding or floor in the economizer prior to removing the old panels. The floor was made of two by six boards and plywood placed over steel braces. Fontenot testified that his day shift crew had cut holes in the skin prior to positioning the two outside panels in place for the night shift, and that the panels were ready for welding at the beginning of the night shift. He identified a photograph of himself that was taken during the Blue Lake job. Fontenot

believes that the last time he worked for the Respondent was in 1994.

Regarding their organizing activities, the testimony of Kyle Evenson, Youngblood, and Womack shows that they, along with Gary Evenson, remained together in the van when they were not working, and did not attempt to mingle with the other members of the crew for the purpose of either socializing or organizing. Nor did they attempt to talk to the other day shift or night-shift employees of the Respondent either at the jobsite or outside the jobsite, at the motel where they knew that other employees were staying. Youngblood testified that the other members of the crew "pretty much avoided me. Nobody wanted to come over and talk to me about anything. They stood back. They stayed away from me . . . we stayed apart."

Manfred Kiesser has been the director of human resources for the Respondent for 4 years. After the Blue Lake job in November 1993, there were grievances filed with the Petroleum Workers Union by Kyle Evenson, Youngblood and Womack, and this prompted Kiesser to phone Allinger about the substance of the grievances. Kiesser testified that Allinger related to him he only had problems with the crew from Tucson, namely, Gary Evenson, Kyle Evenson, Youngblood and Womack, and that these four individuals were slowing the job down; but he felt that under the circumstances he needed to eliminate the entire night crew. Kiesser asked him to confirm this in writing, as Kiesser was investigating the grievances that had been filed. Allinger then sent Kiesser the following letter dated December 13, 1993:

The above referenced customer called during this outage complaining that night shift was unproductive. I flew down to the jobsite after two consecutive nights of productivity problems.

Rather than terminate certain individuals, I decided to R.O.F. the entire night shift crew. Day shift was held over to work a long shift and completed the scheduled outage work.

3. Applications submitted on February 3, 1994

On February 3, Union Organizer and Business Representative Gary Evenson brought a busload of 30 union members, including himself, to the Respondent's Long Beach office for the purpose of filling out applications for employment. The group was given the applications, and they were completed and submitted to the office personnel. At the top of each application the applicant wrote "Volunteer Union Organizer" or similar language. None of the applicants have been hired, and it is alleged herein that the failure to hire the applicants is violative of Section 8(a)(3) of the Act.

4. The Edison Powerplant Job (El Segundo, CA)

Gerald Waite has been a member of the Union since 1968. On February 12, 1994, Waite, who was then out of work, attended a union meeting where it was announced that the Union needed volunteers to organize the Respondent, that the Respondent needed welders, and that the Union had already taken a busload of men to the Respondent's personnel office to apply for jobs. Waite volunteered, and was told by his assistant business manager, Ed Marquez, that the way to obtain employment with the Respondent was to use the name of Allan Thomas, then an employee of the Respondent, and that

Thomas "would put in a name for us . . . Allan Thomas would drop names . . . Allan would drop our names in . . ."

Waite went to the Respondent's personnel office in Long Beach, California, on February 15, 1994, and filled out an employment application. His application indicates that for the past 3 years he was self employed in a "Las Vegas Scraping Business." He was one of a group of apparently several applicants who spoke with Angel Colon, one of the individuals in the personnel office; he became acquainted with Colon and other individuals working in the office after several visits. During his initial visit he filled out the application and was given a form requiring him to become a member of the Petroleum Workers Union within 31 calendar days after beginning employment. Angel told the group about the union membership requirements and about the need to pass a drug screening test, a welding test, a physical examination, and a 4-hour safety orientation.

Waite testified that he may have to take a drug test that very day, at a different location. On February 18, 1994, he took a welding test that lasted about 3 hours, and was told to call back about the results of the test. He called back several times and after several days he was advised that he had passed the test and would need to take a physical. He took a full physical with X-rays, and after the physical he was told that he would be hired and would be given safety orientation training on March 1, 1994. On the day of the safety orientation he was offered a job at a site in Moapa, California, but he declined it apparently because of the location, and he was told that he could go to work at the Edison steam plant at El Segundo, California, the following morning, March 2, 1994. He was allegedly told the job would last about 5 months.

On March 2, 1994, Waite began working on the day shift and worked approximately 2-1/2 weeks before getting an emergency 1-day assignment at Edison's Huntington Beach steam plant. Then he returned to the El Segundo site. Shortly thereafter, another covert union volunteer organizer, Sam Magana, was hired by the Respondent, and began working at the El Segundo site on the night shift. Waite asked his supervisor if he and Magana, who had previously worked together on other jobs, could team up as welding partners. As a result, he and Magana became welding partners on the night shift.⁹ Their supervisor was Homer Clark.

Waite was absent from work 3 days in succession, from April 11-13, 1994. He testified that this absence was due to car problems he experienced in or around Las Vegas, Nevada. He phoned the Respondent's long Beach office, not the El Segundo jobsite, on April 11, and told "Paul" that he was having car trouble and expected to be back the following day. He called again on April 12, and left a message on the answering machine to the effect that he was having trouble getting parts for his car. He again called the Long Beach office on April 13, and talked to Angel Colon, and asked whether his messages had been relayed to the El Segundo job and whether he had been laid off or fired because of his absences. Angel said that he had relayed the messages to the jobsite, and that as far as he knew Waite had not been fired.

⁹Waite estimated that the Respondent employed a total of about 80 employees on the day shift and about 50 employees on the night shift; about 30 of the night-shift employees were welders.

Waite testified that he arrived back home from Las Vegas on the evening of April 13, 1994, at about 8 p.m. The next morning, according to Waite, he phoned the union hall to "to let them know that I had been gone and find out when they wanted to kick off the campaign for organizing." He spoke with Gary Evenson who, by mere coincidence, just happened to be there as this was not Evenson's home local. Evenson asked him to come down to the union hall, and he met with Evenson and Assistant Business Manager Ed Marquez. They discussed organizing strategy, and Evenson handed him a document for his signature, *infra*, announcing that Waite, Magana and another covert employee, Mike Ross, were union organizers on the Union's organizing committee, and intended to organize the Respondent's El Segundo "construction, maintenance and repair employees." The document is also signed by "Gary G. Evenson, International Representative, Organizer." Waite testified that Evenson instructed him to give the organizing letter to Superintendent Homer Clark "if he was being put back to work" after his absence.

Later that afternoon Waite phoned the Long Beach personnel office and asked Colon if he had heard whether he (Waite) had been terminated. Angel said "no," apparently indicating that he had not heard anything, and gave Waite the number at the jobsite. Waite called the jobsite and spoke to an Edison employee and told the employee to relay the message to the Homer Clark that he would be at work that evening. That evening Magana picked him up, as they customarily rode to work together. Waite informed Magana that the organizing campaign was to begin that night, and that Magana needed to sign the organizing letter which was to be given to Clark. They arrived at the jobsite at about 4:30 p.m. Waite met Ross, who was getting off work, and also told him to sign the letter. Then Waite proceeded to locate Clark, and asked him whether he had gotten Waite's various messages. Clark said no, not until that day. Waite said that he had called in every day to the personnel office, and explained to Clark about the circumstances of his 3-day absence; he asked whether Clark was going to let him go back to work. According to Waite, "everybody was real happy and [Clark] said, yes go on back to work."

Waite testified that he got in line at the tool room to pick up his tools for the beginning of the shift, and handed the organizing letter to Magana to give to Clark. He saw Magana hand the letter to Clark, and then he observed that Clark read the letter and apparently told Magana to go to work as Magana, then went up on the elevator to go to work. Simultaneously, Waite placed a union button on his clothing. Then, as Waite was standing in line for his tools, he saw Clark walk to the office, which was about 300 yards away. About 20 minutes later, "after time to go to work," while Waite was still apparently in line waiting to get his tools, he was told by a supervisor to go to the office. Clark was in the office filling out a personnel action form and, in the presence of Project Manager Frank Clinton, Clark told him that "he was sorry that he had to let me go but that Frank Clinton said that he had to fire me because I missed three days in a row." Clark handed him the personnel action form which states that he was being discharged for missing 3 days in a row; the form also contains a "Skill and Performance Evaluation" showing that on a five point scale, Clark rated Waite only as a two, meaning a "fair" employee. Then Clark said

that he had been instructed by Clinton to escort Waite off the premises to his car in the parking lot.

On May 10, 1994, Waite received a call from the Respondent about a possible job at the El Segundo site, and was requested to come in the next morning to work. Waite appeared at work, but was not rehired. He asked if he was not being rehired because of his organizing activity, and was told that he was not eligible for rehire because he had missed 3 days in a row.

Sam Magana has been a member of the Union since 1973. Magana testified that Waite told him about the possibility of a job with the Respondent, and Magana asked his union representatives, Gary Evenson and Ed Marquez, for permission to work there. Magana agreed that he would become a volunteer union organizer. He applied to work for the Respondent on February 18, 1994, at the Long Beach office, and spoke with Angel Colon. Colon said that they needed some tube welders, and gave him an application. He filled out the application and "fabricated" his past employment information because "if I put the amount of money that I'm really making, they would have found that I was a union member, they wouldn't hire me." He was given a drug test and a physical on the same day, and took a welding test the next day. He asked when he could go to work, and Colon told him to keep calling and they would let him know in due time. He called several times thereafter, and called again on March 15, 1994, when he was told that he had passed the welding test and should come to the office. He was told to report to work the next day, March 16, 1994, at the El Segundo job. He was assigned to the night shift, and after about a week he and Waite became welding partners on the night shift.

Magana testified that during the 3-day absence of Waite, Superintendent Clark asked him about Waite and wanted to know what had happened to him. Magana said that he didn't know.

On April 14, 1994, Magana went by Waite's residence, as was his practice, and noticed that his car was there. On the way to work Waite told Magana that he had to sign an organizing letter, and that the letter was to be given to Superintendent Clark that day. When they got to work they found Clark and, according to Magana, Clark told Waite to go to work. He and Waite then went to the tool room to get their tools, at which time Magana reminded Waite about the organizing letter. Waite handed the letter to Magana and asked Magana to give Clark the letter. According to Magana, as Waite was waiting to "get the tools for us," Magana approached Clark, who was in the process of making his customary work assignments for the night shift, and handed him the letter. Clark appeared to read the letter and told Magana to go to work. Thereupon, Magana got his tools and took the elevator up to his work area, while Waite was still in the process of getting his tools. Magana arrived at his work area, waited for awhile, and then came back down and found Waite, who advised him that he had been fired. During the remainder of that day and the following day Magana wore a large union button, about two and a half inches in diameter, and from that point, according to Magana, Clark and the foreman, J.D. Dixon, didn't smile at him anymore, or compliment his work.

Another supervisor, Rick Wimble, approached Magana, who was wearing his organizing buttons and badges, and

said that he wanted to ask him something. He then asked, "What is it about the union? What can you tell me about the union? What are you campaigning about?" Magana replied that if they didn't organize now they would lose benefits and representation, and Wimble said something about the right-to-work law. At that point, after more conversation, Wimble "kind of agreed with" Magana's position, and Magana handed him the business card of his business agent, Marquez.

On the night of April 15, Clark and Wimble came up to where Magana was working and advised him that there was a layoff and he was on the layoff list. Then Clark handed him a layoff slip indicating that his "Skill and Performance Evaluation" was a three, meaning "good," and that he was being laid off because of a reduction in force.

Michael Ross has been a member of the Union since 1981. In February, 1994, his business agent, Ed Marquez, solicited him to go to work for the Respondent as a volunteer organizer in order to organize the Respondent's employees. Ross applied at the Respondent's Long Beach office on March 14, 1994. He spoke with Angel Colon, and Colon said that they had welding work coming up and would be hiring soon. Ross submitted an application which indicted, according to Ross, that he had worked for union employers; Ross testified that persons reviewing his application could have deduced that he was a union member. Apparently Ross did not hear from the Respondent about his application and he phoned the Respondent about 10 days later and asked if they were hiring welders yet. Colon told him to come in and take a welding test. Then he was introduced to Paul, who said they would have the results of the test the next day. Following that, Ross was required to take a drug test and a physical, at two different locations, and he began working for the Respondent at the El Segundo site on March 26, 1994. He was assigned to the day shift. His foreman was Ray Knight.

On April 10, 1994, Ross approached the General Foreman Frank Clinton, who was in charge of the project, and showed him papers that required Ross to appear in court on April 11 and 13, 1994. As a result, Ross missed work on those days, but did work on April 12. On or about April 14, 1994, Ross signed the foregoing organizing letter advising the Respondent of his being a member of the Union's organizing committee. Beginning on April 15, 1994, Ross wore a large Union organizing committee button on his shirt, and one or two union stickers on his hard hat. He believes that he was definitely being watched as there seemed to be a lot of supervisors around him all that day. At the end of the shift he was called to the office by his foreman, Knight, and, in the presence of Project Manager Clinton, Knight told him that "I have to let you go." Ross asked why, and Knight said, "You're laid off. I'm staying out of it, but you did me a good job." Clinton did not say anything. Ross was given a layoff notice stating that his layoff was due to a reduction in force; his "Skill and Performance Evaluation" form indicates a rating of two, meaning "fair."

Ross testified that to his knowledge about four welders had been laid off during the 2 weeks prior to his layoff, but he was told by the welding quality control person that these people were laid off due to poor work performance, as they were making bad welds.

Homer Clark began working for the Respondent at the Edison power plant in El Segundo, California, after first

working there for PSI. Due to insolvency, PSI was removed from the job and Irwin was awarded the contract. Clark, who was night-shift boiler superintendent, continued doing the same work with almost all the same employees. Frank Clinton was his immediate supervisor with both PSI and the Respondent. Clark testified that, "Most of the people that were hired for the job we hired over the phone from our site office there at the trailer," and that in addition, Respondent's employees from other jobs that were winding down were transferred to the El Segundo site.

Clark, who no longer works for the Respondent, remembers Gerald Waite and Sam Magana. Clark, who during his testimony utilized a log book he kept on the job, testified that he discharged Waite, a tube welder, for absenteeism: "He missed three days and I let him go."

Clark testified that he had about 35 employees under his supervision on the night shift, although there were apparently additional employees on the night shift who were not supervised by Clark, and that near the middle of April 1994 the tube welding work was 90 percent complete. In May 1994, a large part of the day shift and the entire night shift, including Clark, was laid off.

Clark laid off Sam Magana on April 15, 1994. About 2 weeks before that time, according to Clark, he advised Project Manager Frank Clinton about an excessive number of tube welders in relation to the remaining work, and suggested that they begin to lay people off. At first Clinton wanted to wait, and later authorized Clark to initiate layoffs.

Clark testified that he discharged Waite, who was a marginal employee at best, after missing 3 days of work. His welding partner was Sam Magana. Waite's performance, according to Clark, "was slow, poor at best." He was preparing to terminate Waite earlier for threatening to "kick the ass" of one of the helpers, but Magana intervened and prevailed upon Clark to give Waite another chance. Clark agreed to give Waite another chance, and Magana agreed that he would be responsible for controlling Waite.

On April 14, 1994, after missing 3 days of work, Waite came in and said he wanted to talk to Clark and explained that his car had broken down in Las Vegas. Clark, who had already decided to terminate Waite, did not tell Waite to go to work. Rather, he told him to wait until Clark finished getting the job lined out and the work assigned for the night shift. Then, while Waite was waiting, Magana handed Clark the organizing letter and proceeded to go to work up on the boiler. Clark took the letter to Clinton, and Clinton told him that it presented no problem and not to worry about it. While in the office, Clark picked up a termination slip and took it back to Waite and signed him off the job. According to Clark, "When he didn't show up three days in a row, he was not coming back to work."

The next day, when he laid off Magana, two other people were also laid off: Jim Dixon and Jerome Washington. Magana and Washington were laid off at the same time during the same conversation. Clark told them that he appreciated their work and that he would see them on the next job. Other people had left by quitting or by termination prior to that date. Clark, who had the authority to terminate employees without prior authorization, testified that the organizing letter had no bearing on whether to terminate Waite or lay off Magana. Moreover, it was customary procedure to walk people off the property upon their termination.

5. The Grayson Powerplant Site (Glendale, CA)

Allan Thomas has been a member of the Union since 1973, and has worked for the Respondent on at least three different jobs. In 1994 he was looking for a job and phoned Vic Allinger, who said he would try to find him a job with the Respondent. Later, Allinger told him to report to the Respondent's Long Beach office and meet with Human Resources Manager Manny Kiesser, and that Kiesser would send him to work. Kiesser told him to report to work at the Grayson power plant in Glendale, California, on February 14, 1994. Prior to this date Thomas had become a volunteer union organizer. Thomas testified that from about the first week of his employment at the Glendale site he wore union stickers on his hard hat as well as a large button with the Boilermakers logo and the words "Boilermakers Organizing Committee."¹⁰

On April 14, 1994, Thomas presented an organizing letter to the Respondent, signed by Thomas and "Gary G. Evenson, International Representative, Organizer," advising that the Union was engaged in organizing activities at the Grayson Power Plant and identifying Thomas as a member of the organizing committee. According to Thomas, Evenson had given the letter to him on April 13, 1994, and had instructed Thomas to give the letter to his supervisor, Tom Boyles; he further told Thomas that the Union was going to establish a picket line outside the Glendale plant in protest of the firing of Waite and Magana at the El Segundo site and, in addition, in protest of the firing of union members at the Blue Lake project in November 1993.¹¹ The picketing began on April 25, 1994, and as a result Thomas ceased work, went on strike, and carried a picket sign protesting "unfair labor practices" by the Respondent. Thomas advised his supervisor, Boyles, that he would be honoring the picket line.

On May 3, 1994, when the picketing was discontinued, Thomas told Boyles that he was ready to return to work and handed Boyles a letter to this effect. Boyles directed him to the Long Beach office to speak with Human Relations Manager Kiesser. Thomas asked Kiesser for reinstatement to his job, and Kiesser said that Thomas had been replaced, that the lawyers had advised him that the picketing was informational and not in protest of unfair labor practices, and that the Respondent had not been able to keep the position open for Thomas' return as there was an obligation to complete the job on schedule. He told Thomas that he could work at the El Segundo job, but he believed that there was picketing at that site. Thomas declined this offer, saying that he could not cross any picket line. Kiesser then said that if there was another job opening, he would send Thomas to it. As a result of the unfair labor practice charge filed by the Union on behalf of Thomas, the Respondent sent Thomas a letter on

¹⁰ This testimony is confusing as it conflicts with Thomas' very specific testimony, on both direct and cross-examination, that he did not inform the Respondent that he was an organizer during the first month of his employment, and that he advised the Respondent of this by letter dated April 14, 1994, *infra*. I conclude that it is more probable that, in fact, Thomas did not wear the union organizing committee button until April 14, 1994.

¹¹ Clearly, Thomas is again somewhat confused, as his testimony does not comport with the facts: Waite was not discharged and Magana was not laid off until the following day, April 14, 1994.

November 7, 1994, regarding further employment. At Thomas' request, a weld test was scheduled for December 7, 1994; however, Thomas failed to appear for the test.

6. Testimony of Manfred Kiesser and John Donaldson

On February 3, 1994, Human Resources Director Manfred Kiesser was in the office when the aforementioned busload of 30 applicants entered to fill out applications. Although he had never met Gary Evenson, he knew who he was as a result of the problems on the Blue Lake project, and someone in the office pointed out to him that Gary Evenson was heading the group of applicants. When they left, he gathered up all of the applications, counted them, and flipped through them in a cursory fashion. Kiesser then put the applications in his office and went down the hall to talk to his boss, John Donaldson, about the matter.

Kiesser testified that the Respondent had not been officially awarded the El Segundo job on February 3; rather it took over the El Segundo project on about February 8, 1994. Initially, the job was manned by rolling over employees from PSI, and Kiesser was instructed by Donaldson not to hire employees for the job as the job would be staffed by PSI rollovers. Thus, the Respondent took over the PSI workforce, including the total supervisory hierarchy, and hired whom-ever those managers or supervisors sent to the office, a total of well over 100 employees, provided that they passed the required tests. There was no break in the work performed by PSI: The former PSI employees filtered into the Long Beach office in groups and they were processed and sent right back out to the jobsite to continue the same work they had been doing while for PSI.

Kiesser's Long Beach office staff, at that time, consisted of four individuals: Kiesser, a full-time personnel manager, and two dispatchers. Kiesser and his staff made special accommodations for the groups of PSI people in order to process them more expeditiously. They were required to fill out the full application package, and were told to complete the drug test paperwork. Then they were sent back to work. In some cases a number of safety orientation meetings were held at the Long Beach office location; in other cases it was arranged to do the safety orientation at the jobsite. Similarly, some weld tests were given at the office, where there is a weld test facility with limited capacity; and other weld tests were given at the jobsite because the new employees were already at the site working, and this would be quicker and more efficient. The customary preplacement physicals were waived due to time constraints. Optimally, Kiesser would prefer to have everything done at the Long Beach office location when he is hiring locally, but this was not possible under the unusual circumstances.

Kiesser testified that the Respondent had been given a crew list from PSI listing all of PSI's employees, and initially checked it as the employees entered the office to be sure that they had indeed worked for PSI. However, because of the large number of people and the resulting confusion, it was simply assumed that the employees were in fact former PSI employees if they so indicated.

Kiesser testified that the Respondent customarily attempts to draw from its existing labor pool to man new jobs. Thus, the Respondent first attempts to hire and/or transfer people from its existing labor pool who are already processed and ready to go to work. On many projects the project manager

is given the responsibility of hiring or bringing employees to the job. In the usual situation, employees transfer from one project to another with little or no down time in between, and these transfers are coordinated between the supervisors at the jobsite. Kiesser's office may or may not be involved in this process. Thus, there is ongoing communication within the company in the form of a companywide informal network as to the status of jobs: the superintendents are interested in keeping their better hands working, and may attempt to find work for them by calling another superintendent on a job about to begin. Or, people in Kiesser's office, who have knowledge of such information, would advise project managers in the field of jobs about to begin or end so that they can do their own recruiting. According to Kiesser, the process is "very fluid and it's very situationally defined." In particular this is the way most skilled workers are placed on jobs.

If Kiesser is advised that a jobsite needs personnel and that management is going to rely upon the Long Beach office to furnish the necessary employees, his office personnel will access the computer database to recruit people for the project. Names will be drawn from the database or dispatchers will utilize their personal knowledge of available employees for dispatching to jobs. This database contains sub-categories of employees who belong to a particular group. A large part of the labor force consists of Navajo Nation employees who live on a reservation in Arizona and who work almost exclusively on energy division jobs as welders and mechanics and helpers. Other groupings of employees work almost exclusively on refinery jobs. Kiesser testified that it has always been the Respondent's practice to refrain from assigning energy division journeyman employees to refinery work, and vice versa, as the work is considered to be specialized and Kiesser had been instructed that the work forces were not to be mixed. For this reason Kiesser never considered the 30 applicants for refinery positions, but just regarded them as applicants for powerplant work, and only for the position of welder.

In 1994, applicants who had not previously worked for the Respondent were not put into the database until they had commenced the employment process. The employment process does not begin with the mere submission of an application. Rather, something in addition to the submission of an application was necessary to begin the process: scheduling for a drug test, safety training, or weld test. Such information has to be retained, and at the time it is placed in the database the applicant is assigned an employee number, even though, ultimately, the applicant may not be hired.

Thus, the database in February 1994 included anybody that was a current or prior employee, or individuals who had commenced the hiring process so they could be placed in the database as eligible for hire; but it did not include individuals who merely filled out and dropped off applications at the office such as the 30 applicants involved herein. Normally, if time permits, such applications would get "filed" by craft in one of several rolling filing cabinets, but no one in the office would go back to them to recruit employees. Kiesser testified that this was not a good system, as sometimes applicants put more than one craft or area of expertise on their application, and the applications just get tossed in the filing cabinets and are ignored.

This system was changed after 1994 because, according to Kiesser, "all the applications in a bin were useless to us . . . the effort it would take to go back to those and try to find people and have some idea of how long it had been since they applied, et cetera, was just too cumbersome. Plus there was this whole business of how are you going to file them . . . and I knew I was probably losing a lot of people that I may at least want to keep in touch with." Currently, commencing about the beginning of 1995, each applications is assigned a control number, and names and skills of applicants are entered into a separate part of the database and can be readily accessed. However, as noted above, this was not the case on February 3, 1994.

Thus, it was not until about the beginning of 1995 that the applications of over a thousand applicants had been entered into this new database system. However, according to Kiesser, not very many of the people in this category have been hired because, "Even with the database, we very rarely draw from that applicant database to solicit people to come to work."

Applicants are hired "through the door" at the Long Beach office if they have been referred by someone who is known to the Respondent to be trustworthy to send qualified applicants to the office, such as an employee or supervisor. In addition, walk-in applicants without such a reference may be hired if the applicant happens to come to the office at the right time when the Respondent is in the process of staffing a job or when the office people are not terribly busy. Sometimes, when a safety class has been scheduled for other applicants, a walk-in may be permitted to take the class simply because he or she happens to be in the office when the class is being given, and this commences the hiring process. According to Kiesser, there is no set rule regarding the hiring of walk-ins, but it is really a matter of timing: If an applicant walks through the door at an opportune time, he or she stands a better chance of getting a job.

Kiesser testified that there are numerous people who come in, fill out an application, come back, call, check on job availability, ask about the availability of safety and training classes, and simply "push" or "hustle" for the job. In contrast, if somebody simply comes in, fills out an application, and does not call back but merely waits for a response, then his chances of getting hired are, according to Kiesser, "Close to zero." This is particularly true of skilled employees, such as journeyman welders and electricians, as they are customarily recruited by the various means outlined above. However, it is not as unusual for nonskilled, entry level employees, such as helpers, laborers, and safety watchpersons to be hired as a result of applying at the Long Beach office, as such personnel are less likely to be hired or retained through the companywide informal network. The Respondent's records appear to corroborate Kiesser's testimony on this point, and show that of all the employees hired between January 1 and April 30, 1994, the great majority of employees who could have possibly been walk-ins, that is, for whom the records did not contain some indication that the employee had been a former employee, or had been transferred from another job, or had been referred by someone known to the Respondent, were nonskilled employees and were not hired for positions sought by the 30 applicants.

Normally, there would have been no effort made to contact any of the 30 applicants who came in on the bus; there

was no need to. However, in this particular circumstance some effort was made to hire some of them, as Kiesser was instructed by the Respondent's attorney to try to do so. On about February 24, 1994, Kiesser attempted to hire people from this group, and instructed his staff that if any of the 30 applicants came in to the office, or initiated a call to the office, he wanted to know about it. He phoned between 8 and 11 applicants on February 24, then tried again a few days later, and then made a third effort in early March. He had never made such phone calls before, and to hire people in this manner was "absolutely unusual." Then he discontinued this process as he wasn't getting much response, and it just kind of fell through the cracks. Of the 8 to 11 applicants whom Kiesser contacted or attempted to contact, only one came in to take a welding test. That person was then sent for a drug test, and he was told to call back in a few days to check on both the weld test and the drug test; further, he was told he would have to complete safety training. Even though he did not call back as instructed, Kiesser attempted to place him on one job, but discovered that he wasn't qualified for the job as he did not have a particular kind welding certification that the work required. The employee was never hired as he did not call back or show any further interest in being hired. Similarly, none of the 30 applicants "hustled" a job with the Respondent.

Regarding the discharge of Waite and the layoffs of Ross and Magana at the El Segundo job, Kiesser testified that no one called him prior to these events, and that the management of the project had made the decisions without conferring with him. In fact, according to Kiesser, Waite was mistakenly sent out to the El Segundo job after his discharge, but was not hired as Project Superintendent Clinton phoned him and said that Waite had been fired for absenteeism and would not be rehired.

Regarding the organizing letter submitted by Alan Thomas at the Glendale job, Kiesser testified that he received a phone call from Supervisor Tom Boyles regarding the letter on about April 14, 1994. Kiesser had placed Thomas on the job pursuant to a phone call from Vic Allinger, who said he had worked with Thomas for a number of years, and that he was a good welder. Boyles told him that Thomas was wearing boilermaker buttons, and Boyles asked what he should do. Kiesser told him not to worry about it, that Thomas had a right to give him that letter, and to let Kiesser know if there were any problems with Thomas' productivity or whether Thomas was attempting to engage in organizing activities during working time. Boyles replied that things were going fine, and that there were no problems.

Several weeks later, upon requesting reinstatement at the end of the picketing, Thomas came to the office to see Kiesser. Thomas explained that he knew all the people on the picket line and he didn't feel that he could go to work while they were not working, but that he was ready to go back to work now that the picketing had ended. Kiesser said that because the Glendale job was fairly small Thomas had been replaced and his position had been filled; however, Kiesser said that he would look elsewhere for a job for him. Kiesser mentioned the El Segundo job, and said that he might be able to get him on there, but that he believed there was a picket line established by the Union at the El Segundo site. Thomas said that he couldn't go to work anywhere where there was picketing. Kiesser replied that he thought El

Segundo was the only job available at the time and Thomas left and never called back again.

Kiesser testified that from time to time the Respondent has placed ads in various newspapers for skilled personnel. Such ads were placed on about December 6, 1993 (Bakersfield Californian), a year later on December 6, 1994 (various Texas and Oklahoma newspapers), and nearly a year after that on October 6, 1995 (Los Angeles Times). Kiesser testified that the ads were not placed for the purpose of immediately filling unfilled positions, but because the Respondent was anticipating a great deal of work and wanted to identify and ascertain the availability of personnel for future jobs in the event the Respondent's projections materialized. No employees were hired as a result of the foregoing ads, in large part because the Respondent did not get the anticipated work or because contracts for future work were canceled by customers.

John Donaldson is the executive vice-president of the Respondent. He is the chief operating officer of the company, and all of the divisions and departments report to him. He leads the negotiating team in collective bargaining negotiations with the Petroleum Workers Union; this union has been the collective bargaining representative of the Respondent's employees for twelve or fourteen years, and the current agreement at the time of the hearing herein extended from June 1, 1993 through May 31, 1996. The bargaining unit covers employees at all sites where the Respondent's employees are employed. Donaldson testified that Vic Allinger, who managed the Respondent's Vancouver, Washington office, left the Respondent's employment in the Spring of 1994. While the record does not indicate the reason for the resignation/termination, Donaldson testified that the Respondent was very anxious to have him leave.¹² Allinger was a former member of the Boilermakers Union, and he was never told not to hire Boilermaker union members for positions with the Respondent. As far as Donaldson knew, Allinger had remained a member of the Boilermakers throughout his employment with the Respondent.

In October, 1993, Donaldson became aware that Gary Evenson and Kyle Evenson were paid union organizers with the Boilermakers. He was informed of this by Tom Walsh, a representative of the International Petroleum Workers Union, who sent him a fax to this effect on February 26, 1993, listing some 100 names of union organizers. Walsh, according to Donaldson, has a strong dislike for the Boilermakers, and was probably trying to influence Donaldson to not hire these people "in order to make Walsh's life easier." Donaldson gave the fax to Kiesser and asked him if any people on the list worked for the Respondent. Kiesser later told Donaldson that both Gary Evenson and Kyle Evenson had worked for the Respondent in the past, but were not employed at the moment.

¹² The record shows that various former supervisors of the Respondent, including Allinger, who were employed during the events encompassed within the complaint herein, are no longer working for the Respondent and that some of them left the Respondent's employ under less than amicable circumstances. I do not draw any adverse inferences from the fact that these individuals, who are equally available to the General Counsel, the Union, and the Respondent, were not called as witnesses by any party to this proceeding; this is particularly true where the events in question occurred as much as a year and a half prior to the commencement of the hearing.

Within a week or two Donaldson spoke to Vic Allinger about this, and asked if he had ever had any problems with either of the Evenson brothers, as they were paid union organizers. Allinger said that Gary was a friend of his, and that Gary and Kyle had worked for him on numerous occasions, and they had given him no problems at all.

Donaldson testified that the Respondent has had no policy against hiring Boilermaker union members. In fact, there was a period of time when the Respondent had an agreement with several Boilermaker locals to hire their members when they were out of work on the East Coast and came to California during the Winter, on these occasions the Petroleum Workers Union issued them permits and waived their initiation fees. However, this arrangement ended in about 1987, as a result of protests by a Los Angeles local of the Boilermakers.

Donaldson has not spoken with Vic Allinger since he left the Respondent's employ, at which time the relationship was very acrimonious. After he left, he began working for a competitor. Since the Blue Lake project with Ultrapower, the Respondent has never been asked to bid on another Ultrapower job and has never had another contract to perform work for Ultrapower.

In early 1994, the El Segundo project was taken over by the Respondent from Power Plant Specialties, Inc. (PSI). The Respondent was advised that PSI was going to be removed due to financial exigencies, and was invited to submit a bid for the remainder of the project. There were several components of the project and work took place at three locations, namely, El Segundo (the major location), Huntington Beach, and Mandalay, California.

It was a very large job and it was reluctantly decided to hire all of PSI's employees who had been working on the jobsite, including their management, to provide continuity to the job that was underway. This included Frank Clinton, PSI's general superintendent, the person in charge of the entire project. Clinton was never again used after that, and the record indicates that the Respondent was not satisfied with him. All prior PSI employees were hired provided that they passed the various tests, many of which were performed on-site. Some had suffered some economic hardship, as they could not get their paychecks cashed, and left town, and at some point the Respondent had to hire some employees for the El Segundo job through the Long Beach office. The El Segundo part of the job was completed about the end of May 1994.

Donaldson testified that he was made aware of the 30 Boilermaker applicants who had applied for work on February 3, 1994, and that they all arrived on a bus together with Gary Evenson and wrote voluntary union organizer on the top of their applications. He looked over the applications, had a discussion with a number of the staff, and, after conferring with his attorney, instructed the human resources department to make a diligent effort to try to hire some of these people. His attorney suggested that he do this in order to avoid legal liability in the event an unfair labor practice charge was filed. After about February 4, 1994, the personnel office was "overwhelmed" by the work involved in taking over the project.

Donaldson admitted his suspicion that the busload of 30 applicants was a tactical means of involving the Respondent in costly litigation. He is knowledgeable concerning the Boilermakers' "Fight Back" campaign, he reads the Boilermaker

newspaper, and is conversant with the current tactics employed by various unions, including the Boilermakers, to protect their interests. Accordingly, he believed, upon receiving the 30 applications, "that we were going to be a target for legal extortion." Still, Donaldson testified that he was not concerned about legitimate organizational activity, and had no problem with union members who did their work and attempted to organize on their own time.

7. Analysis and Conclusions

The credible record evidence is overwhelming that paid Union Representatives/Organizers Gary Evenson and Kyle Evenson, and union volunteer organizers Youngblood and Womak, were involved in a concerted effort to slow down the Ultrapower job in November 1993. I credit the testimony of each of the Respondent's witnesses and find that they were forthright, and that, having no continuing relationship either with each other or with the Respondent, they had very little reason to prevaricate or to embellish their testimony. Moreover, their collective testimony is totally consistent in all salient details, and is corroborated by photographs taken by Superintendent Shair-Ali that show, according even to the testimony of Kyle Evenson, the interior of the economizer to be clean and safe, with appropriate scaffolding, so that welding work could begin immediately. In this regard I credit Shair-Ali's testimony, who at the time in question was a member of the Union,¹³ that the photographs depict the work area as of the evening of November 2, 1993, immediately prior to the beginning of the night shift; moreover, the testimony of all the Respondent's witnesses, who testified that their independent recollections of the work area comport with the photographs, is mutually corroborative.

I further find that the four individuals intentionally delayed going back to work after the fan had been balanced and waited an hour or more in their van before finally, after the third request by supervision, returning to their work area near the end of the shift. The credited consistent testimony of Ultrapower Plant Engineer George Nowland, and Respondent's night shift foreman, Rocky Waltman, is entirely clear on this point.

Finally, it is clear that after the safety meeting, during which the employees were given assurances that the area was entirely safe and presented no chemical or other hazards, Kyle Evenson and his crew did not go back to the economizer and begin welding, but rather continued to do no work at all for about 3 or 4 hours. I therefore find that, as contended by the Respondent, their collective participation in endeavoring to obtain the MSDS safety data was contrived for the purpose of intentional delay and was not undertaken in good faith.

In conclusion, I find that the four employees were indeed discharged for their concerted activity, namely, attempting to slow down and prolong the project, as contended by the Re-

spondent. Moreover, this does not appear to be simply a case of a slowdown for personal monetary gain, that is, in order to prolong the job and thereby obtain more hours of work. Rather, this slowdown began at the very instant the Union began its organizing "fight back" campaign against the Respondent, and was in retaliation for the Respondent's legitimate request that Gary Evenson sign a document acknowledging that he was there as a company superintendent and not as a union organizer. I find that the slowdown was indeed a part of the Union's strategy. I further find the charges filed by the Union herein regarding this matter to be frivolous, knowingly false, and an integral part of the Respondents "fight back" strategy, and that they were contrived in order to cause the Respondent to expend considerable resources in defending itself before the Board. Accordingly, in addition to dismissing the complaint allegations, I deem it appropriate and necessary to recommend that the Board impose an affirmative remedy designed to effectuate the purposes of the Act and to preclude the filing of bogus charges in the future. In the absence of such a remedy the Respondent, even though not prevailing on the merits of the case, will have accomplished one of its purposes and therefore will have no incentive to discontinue such conduct.

Thus I recommend that the Board require the Union to reimburse both the Respondent and the Board for reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable expenses, including all costs incurred in both the investigation and litigation of those portions of the charges and complaint dealing with the Ultrapower job. See *Tidee Products*, 196 NLRB 158 (1972); *Heck's Inc.*, 215 NLRB 765 (1974); *Davis Supermarkets*, 306 NLRB 426, 428 (1992).

The record contains abundant evidence that the Respondent relies heavily upon its employees and particularly upon its supervisors to recommend and refer competent and qualified employees to its work force. Indeed, it gives its project supervisors, in many instances, the authority to hire such employees in the field if the supervisor is willing to vouch for their qualifications and abilities. Thus, for example, on the Blue Lake job the supervisors "hired" their crews and brought them to the jobsite. A corollary of this trust in its supervisors seems to be that if the supervisor proves to be untrustworthy the Respondent is entitled to take a similar view of any of his referrals.

In the instant matter former Superintendent Gary Evenson brought a busload of 29 other union members to the Respondent's Long Beach office on February 3, 1994, and all applied for jobs and conspicuously indicated that they were volunteer union organizers. This occurred only 3 months after Evenson and his crew, as found above, had engaged in a willful slowdown immediately upon commencing a campaign to organize all of the Respondent's employees, during which, it is important to add, the Union engaged in no organizing activities whatsoever other than to make a conspicuous point of announcing that it intended to do so. This is precisely what the 30 applicants "announced" when they placed the words "Volunteer Union Organizer" at the top of their applications.

Under these circumstances, given Evenson's history of untrustworthiness and the Union's initial ostensible "organizing" strategy, namely, a slowdown at the Blue Lake job, the

¹³ While this has no bearing on my evaluation of credibility, I am concerned regarding the fact that the Union has apparently taken some recourse against Shair-Ali. Thus, the record evidence clearly indicates that following his testimony herein, during the course of a Local Union meeting, Shair-Ali was admonished by a union representative for giving testimony in this proceeding adverse to the Union and, as a result, it appears that he either withdrew or was expelled from the Union. There is no indication that charges have been filed regarding this matter.

Respondent is entitled to draw the reasonable inference that this is the method the Union had elected to use to organize its workforce on a companywide basis. Indeed, from the time of the Blue Lake job the Union had given the Respondent absolutely no reason to believe that the Union's modus operandi would change and that it would, commencing on and continuing after February 3, 1994, engage only in permissible organizational activities.

Accordingly, I conclude that under these circumstances the Respondent was under no obligation to hire as employees any of the applicants who announced that they were volunteer union organizers. While these individuals may have simply wanted to engage in productive work and in lawful organizing activity, the Respondent's recent experience with the Union and particularly with the leader of the group, Gary Evenson, demonstrated the contrary. Under such circumstances the burden and expense should not be placed upon the Respondent to test the Union's bona fides by requiring the hiring of the applicants simply because, with the exception of Evenson, they had not previously engaged in individual misconduct. By its prior conduct, the Union had placed this burden of proof upon itself, and I find that it was therefore incumbent upon the Union to affirmatively demonstrate to the Respondent that slowdowns were no longer a part of its organizing strategy. Cf. *Brown & Root USA, Inc.*, 319 NLRB 1009 (1995). On this basis alone, I conclude that it is appropriate to dismiss this allegation of the complaint.

However, I also find that on February 3, 1994, the Respondent's Long Beach office was not in a hiring mode. Rather, it was gearing up to process a multitude of PSI transferees who were automatically to become employees of the Respondent at the El Segundo site. I credit Human Resources Director Kiesser who testified at length in this proceeding on several different occasions, and who impressed me as a knowledgeable and forthright witness, and find that he had been told that the Long Beach office would not be responsible for staffing the El Segundo and related jobs. Thus, when the applicants applied on February 3, 1994, there was no immediately available work for them. Moreover, within a short time thereafter, when the Long Beach office was apparently requested to furnish some employees to the job, the Respondent did attempt to contact and hire some of the applicants. I credit Kiesser and find that his personal attempts to hire some of the applicants, pursuant to instructions from Davidson, were legitimate and in good faith, but proved to be of no avail for a variety of individual reasons which Kiesser credibly related during his testimony, and which had nothing to do with the applicants' union activity.

Accordingly, assuming arguendo that the Respondent had no right to automatically deny employment opportunities to the applicants for the reasons enunciated above, I nevertheless find that the Respondent acted appropriately under the circumstances, in an overabundance of caution, pursuant to the advice of its attorneys, by attempting to hire some of the applicants.¹⁴ There, is no more reason for the Respondent to

contact each of the thirty applicants than there is for the Respondent to contact each of the hundreds of applicants it then had in its rolling filing cabinets or that it now has in its computer database. In fact, it is certainly arguable that by attempting to hire only the union applicants, the Respondent was deviating from its customary past practice and was thereby discriminatorily favoring union applicants over non-union applicants in violation of the Act.¹⁵ The record evidence is clear that very few employees are hired as a result of simply walking into the office, submitting applications, and waiting to be contacted, particularly if they are skilled journeymen.

Rather, as the record reveals in the hiring of Thomas, Waite, Magana and Ross, these individuals were either referred for employment (Thomas), or happened to walk in at opportune times and/or thereafter actively sought work. Thus, they did not apply until well after the Respondent had taken over the El Segundo job (Waite, on February 15; Magana, on February 18; and Ross, on March 14, 1994) at a time when the Respondent had exhausted the supply of PSI roll-over employees and transferees from other jobs and realized that additional welders may be needed, and, upon being told to call back because it appeared to the Respondent's office personnel that that the Respondent would soon be hiring, they nevertheless were not immediately hired (Waite, on March 2; Magana, on March 16; and Ross, on March 26, 1994). Their hiring is consistent with the testimony of Kiesser regarding the Respondent's hiring practices which, I find, were non-discriminatory and were predicated upon the exigencies of the Respondent's business operations at that time.¹⁶

Conversely, the record evidence abundantly establishes that February 3, 1994 was not an opportune time for the Union applicants, or any applicants, to walk through the door. Moreover, it does not appear that, as suggested by the Union in its brief, the Respondent had an obligation to tell the applicants that they would have a better chance of obtaining employment if they "hustled" for a job. In the first place, there is no evidence that any applicants are so advised; secondly, this would defeat the Respondent's purposes in hiring employees who exhibit a real desire to work by demonstrating a degree of individual initiative; and finally, as noted above, the thirty applicants walked through the door at a time when Respondent was gearing up for the processing of an unprecedented influx of PSI personnel, and this was a particularly inopportune time for the office staff to create additional work for itself. I shall dismiss this allegation of the complaint.

Regarding the April 14, 1994 discharge of Waite at the El Segundo site, I credit the testimony of Superintendent Homer Clark, who impressed me as a candid, no-nonsense supervisor with an excellent recollection of the events in question. I find that Clark had made up his mind to discharge Waite prior to the evening of April 14, 1994, when he was handed the organizing letter. Moreover, I find that he did not tell Waite to go to work that evening. Rather I find that he told

¹⁴ I also find for the reasons set forth herein that the Respondent had no obligation to even attempt to hire any of the thirty applicants, as the record evidence establishes that this is not consistent with the Respondent's ordinary and lawful hiring practices. The fact that it did so attempt to hire some of these applicants, under the circumstances, does not constitute an implicit admission to the contrary.

¹⁵ Cf. *Brown & Root USA, Inc.*, 319 NLRB 1009, fn. 4 (1995).

¹⁶ See *Wireways, Inc.*, 309 NLRB 245 (1992), at page 252: "giving first consideration to those applicants who check back and show more interest in employment, is an acceptable business practice."

Waite to remain in the tool room area until Clark had completed his assignments to the workers at the beginning of the shift, after which time he discharged Waite for absenteeism. I do not credit the inconsistent and nonsensical testimony of Waite and Magana: If Clark had told Waite to go to work then it follows that Waite and Magana would have gotten their tools and would have gone up on the elevator together; and the fact that Magana, who arrived at work with Waite and had gotten his tools, went to work alone, coupled with Waite's admission that he was waiting around in the tool room for some 20 minutes, corroborates Clark's testimony that Clark told Waite to remain in the tool room area and did not direct him to go to work. I shall dismiss this allegation of the complaint.

I further find that Magana and Ross were laid off on the following day, April 15, 1994, because, as Clark credibly testified, the job was winding down and the Respondent was eliminating excess welders. Several employees had been laid off earlier on the day shift, as admitted by Ross,¹⁷ and on the night shift Magana and another employee not involved herein, Washington, were advised by Clark of their layoffs during the very same conversation. It is not a mere coincidence that Clark was given the organizing letter on the evening of April 14, 1994, and I do not credit the strained and incredulous testimony of Waite regarding the origination and timing of the organizing letter: It is revealing that Waite, Magana and Ross, who admittedly were recruited by the Union to organize the Respondent's employees, did not engage in any union activity until April 14, 1994 (well over a month following the employment of Waite and Magana, and over two weeks following Ross' employment), even though the job was of relatively short duration. It is reasonable to assume under the circumstances that the Union selected this date because it was advised by Waite, Magana and Ross, who were among the last welders hired, that layoffs were taking place, and that the organizing letter scenario was contrived to cause the Respondent to either refrain from laying them off or to set up the Respondent for an unfair labor practice charge in the event they were among those laid off. I shall dismiss these allegations of the complaint.

Having found that the layoffs of the four employees at the Blue Lake job were not discriminatorily motivated, as alleged, and that the discharge of Waite and the layoffs of

Magna and Ross at the El Segundo job were not unlawful, as alleged, I further find that the picketing at the Glendale site was not in protest of any unfair labor practices committed by the Respondent, as alleged. Accordingly, Thomas was not a ULP striker entitled to reinstatement. Therefore, I shall dismiss the complaint allegation pertaining to the Respondent's refusal to reinstate Thomas to his position at the Glendale job, as the Respondent had the right to permanently replace him when he discontinued work and went out on an economic or informational strike.

The complaint alleges that on about May 5, 1994, Gary Evenson and Youngblood were discriminatorily refused employment at the Tucson Electric Power Plant jobsite. I shall dismiss this allegation of the complaint, as the misconduct of Gary Evenson and Youngblood at the Blue Lake job some 7 months earlier has provided the Respondent with sufficient lawful reason to refuse to hire them for any job in the future.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
 3. The Respondent has not violated the act as alleged.
- On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The complaint is dismissed in its entirety.

The Union herein, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, its officers, agents, and assigns, shall reimburse both the Respondent and the Board for reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable expenses, including all costs incurred in both the investigation and litigation of those portions of the charges and complaint dealing with the Ultrapower job.¹⁹

¹⁷ It should be noted that Ross was apparently the last Welder to be hired by the Respondent at the El Segundo site, and that his application indicated his affiliation with the Union.

¹⁸ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁹ The Respondent has suggested other sanctions in its brief and it may raise those before the Board.